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1950

# Marilyn Bingham and Jack T. Bingham v. Board of Education of Ogden City : Brief of Respondent

Utah Supreme Court

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Wade M. Johnson; Attorney for Defendant and Respondent;

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CASE NO. 7468

# In the Supreme Court of the State of Utah

MARILYN BINGHAM, an infant, by JACK T.  
BINGHAM, her guardian ad litem, and JACK T.  
BINGHAM, in his own right,

Plaintiffs and Appellants,

*vs.*

BOARD OF EDUCATION OF OGDEN CITY,  
A public corporation,

Defendant and Respondent.

## RESPONDENT'S BRIEF

**FILED**  
APR 17 1950

Clark, Supreme Court, Utah

WADE M. JOHNSON,

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Ogden, Utah

*Attorney for Defendant and Respondent.*

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## A R G U M E N T

The respondent is satisfied that the law issues in this case have been fully and completely decided against the appellants by this Honorable Court in the case of Niblock vs. Salt Lake City, 100 Utah, page 573, 111 P. 2nd 800.

Justice Wolfe, who, I understand from reading his opinions, does not agree with the full scope of the doctrine of sovereign immunity, states in the last sentence of his opinion in the Niblock as as follows:

“However, since the decisions of this court have steadfastly refused to so limit the doctrine, the prevailing rule must continue to be the law until the Legislature sees fit to change it.”

Justice McDonough says at page 577:

“This court is committed to the doctrine that the duly

to repair or construct streets within its corporate limits is a governmental one and that in the absence of a statute no liability devolves on a municipality for the defective condition of its streets.”

That on page 581 Justice Mc Donough says:

“That a statute imposing liability for injuries resulting from defects or dangerous conditions in the way does not authorize recovery by one injured through the negligent operation of a vehicle or machine by one engaged in repair of a highway is the holding of a majority of the court.”

Supporting said doctrine, if it needs any support, is the following paragraph from the voluminous note from 160 A.L.R., at page 23, being the last paragraph on said page in which the annotator writes:

“Nevertheless, even assuming that the general rule of immunity is arbitrary, harsh and unjust in requiring the individual alone to bear an injury, and that society, in keeping with the modern trend, should afford relief, the courts generally have taken the view that it is for the legislature and not the courts to abrogate or change the rule.”

As stated by the annotator under the sub-paragraph, Summary, page 20 of said note:

“In the United States, public education, including that of elementary, high school, or college grade, is universally recognized as a public or governmental function of the state. The rule is well settled that the state, unless it has assumed such liability by constitutional mandate or legislative enactment, is generally immune from tort liability because of its sovereign character”.

In each and every case where this question is discussed by our courts it is assumed and decided that local Boards of Education are engaged in a governmental function.

In 1923 the Legislature of the State of California passed the following enactment the same being Section 2, Chapter 328 of the Statutes of 1923:

“Counties, municipalities and school districts shall be liable for injuries to persons and property resulting from the dangerous or defective condition of public streets, highways, buildings, grounds, works and property in all cases where the governing or managing board of such county, municipality, school district, or other board, officer or person having authority to remedy such condition, had knowledge or notice of the street highway, building, grounds, works, or property and failed or neglected for a reasonable time after acquiring such knowledge or receiving such notice, to remedy such condition or failed and neglected for a reasonable time after acquiring such knowledge or receiving such notice to take such action as may be reasonably necessary to protect the public against such dangerous or defective condition.”

The decisions of the Supreme Court of California are, therefore, based upon the application and the interpretation of that statute.

I desire to call the court's attention to the following case:

Antin vs. Union High School District, (an Oregon case)  
280 Pac. 664, 66 A.L.R. 1271.

In 66 A. L. R., page 1274, the court says:

“Under the statute No. 357, 358, Oregon Laws, a school district may sue and may be sued, and an action may be maintained against a school district ‘for an injury to the rights of the rights of the plaintiff arising from some act or omission’ of the district. Oregon Laws No.358. If this were a case of first impression, and there were no controlling decisions upon this question, we would be inclined to hold--at least, such is the opinion of the writer--that the Legislature intended

by the enactment of these two sections to make a school district liable for the consequences of its own wrongful or negligent acts, although not liable for the misfeasance or nonfeasance of its officers or agents; and such was the effect of the holding in *McCalla vs. Multnomah County*, 3 Oregon 424, when the statute as then in force, now No.358, Oregon Laws, embraced not only incorporated towns, school districts, and other public corporations of like character but also counties. But this statute has been too often construed by this court, and held not to include within its purview an injury arising from some public or governmental act of public corporation, to be now open to question in respect to the nonliability of a public corporation for an injury arising from the performance of it of a public or governmental act. (case cited)"

For an extensive discussion of this general question, see that portion of the note in 160 A. L. R. commencing at page 85, under the sub-head of Effect of Legislative or Constitutional Enactments.

It is the contention of the respondent first, that it was not guilty of any negligence in the manner of its maintenance and operation of the so-called incinerator and that said incinerator in the manner of its maintenance and operation did not constitute a nuisance and that it could not expect that a baby two years of age would fall off its tricycle at or near the incinerator and thereby become injured.

The Board of Education is a public corporation and it can not and does not fence off its school grounds so that small children may not at times come upon the school grounds. But that is not the full test. The test in this case is whether, or not the defendant was under duty to anticipate a baby upon a tricycle falling into the hot embers of this incinerator.



Such like incinerators had been maintained on all the school grounds for many years and nobody had been hurt. This, of course, is a very unfortunate accident.

In closing I would like to call the Court's attention to the allegations of the complaint. At no place in the complaint is the word "negligence" used. It seems remarkable that a complaint grounded on negligence should have failed to use that descriptive word.

I am quite sure that counsel for appellants were afraid to use that word. But whether or not they used that word, the basis of the appellants purported cause of action, if any exists, is founded upon negligence.

It is therefore contented by the respondent that the demurrer was properly sustained and the complaint properly dismissed.

Respectfully submitted,

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